IN THE HIGH COURT OF BOMBAY AT GOA

FIRST APPEAL NO. 62 OF 1999.

Vijaya Bank, a body corporate, constituted under the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1980, having its head office at Bangalore and its branch office at Margao, Goa. ... Appellant/ Plaintiff

VERSUS

Shri F.V. Hiremath (deceased) through his legal heirs:

1. Smt. Halamma F. Hiremath, r/o Hubli.

2. Shri Ravi Hiremath, r/o Hubli. .... Respondents/ Defendants.

Shri M.S. Joshi, Advocate for the Appellant.

Respondents absent.

CORAM: N.A. BRITTO, J.

DATE: 13TH APRIL, 2004.

ORAL JUDGMENT:

This appeal is filed against the judgment/decree dated 24.2.1999 of the learned Civil Judge Senior Division, Margao by which the learned Civil Judge has dismissed the suit filed by the plaintiff for recovery of Rs.1,10,680.60 with interest at the rate of 18% from the date of filing

of the suit.

2. There is no dispute that the defendant (since deceased) was granted overdraft facility to the tune of Rs.50,000/- upon execution of an agreement on 1.2.1995. There is also no dispute that the said defendant acknowledged the said overdraft facility on 30.1.86. The only dispute was whether the defendant had also acknowledged the debt on 13.3.87 vide Exh.30 It was the case of the plaintiff that the defendant had acknowledged the amount in the overdraft account by virtue of the said acknowledgement dated 13.3.87 (Exh.30) amounting to Rs.65,991.30 as on 31.12.86 and since the defendant had failed to repay the overdraft amount the plaintiff filed the said suit for recovery of the said amount of Rs.1,10,680.60 with interest at the rate of 18%.

3. The defendant contested the suit by filing a written statement through his son and attorney namely Ravi Hiremath. As far as the execution of the said acknowledgement dated 13.3.87 was concerned, the defendant merely denied that he had acknowledged any debt and put the plaintiff to the strict proof thereof. However, it appears that subsequently the defendant died and the said Ravi Hiremath was brought

on record as a legal representative of the said defendant. The said newly added defendant/legal heir of original defendant filed an additional written statement, though under law, he was not entitled to file the same. In the said additional written statement the defendant/legal heir stated that the suit was not maintainable as it was clearly beyond the period of limitation as the original defendant had never signed the alleged acknowledgement of debt either on 13.3.87 or at any time. In the light of the said plea taken by the defendant/legal heir issue Nos.2 and 4A came to be framed in addition to other issues. The learned Civil Judge S.D. as far as issue No.2 is concerned, has given a finding against the plaintiff and as far as issue No.4A is concerned, the learned Civil Judge S.D. has at the same time answered the said issue in the negative.

4. The plaintiff had examined their Branch Manager namely P.W.1 Shri Shetty and had produced the relevant documents including the said disputed document namely the acknowledgment of debt dated 13.3.87 at Exh.30. The defendant/legal heir did not step in the witness box.

5. The learned Civil Judge S.D. while discussing

the evidence on issue no.2 observed that the burden to prove the acknowledgment was executed on 13.3.87 was on the plaintiff. Here it maybe noted that the plaintiff had produced the said acknowlegement dated 13.3.87 at Exh.30 and P.W.1 Shri Shetty had stated that the defendant had subsequently acknowledged the debt on 13.3.87 at Exh.30. No doubt P.W.1 Shri Shetty in his cross-examination had stated that the said acknowledgment (Exh.30) was prepared at Margao and was sent to one of their branches at Hubli to take the signature of the defendant and that he did not know which officer had approached the defendant to obtain his signature. It was suggested to P.W.1 Shri Shetty in the course of his cross-examination that the said acknowlegement - Exh.30 was executed along with the promissory note and other documents. Here it may be noted that even in the said additional written statement the plea taken by the defendant/legal heir was that the said acknowledgment was not signed by the defendant on 13.3.87 or at any time. The cross-examination did show that there was variance between the suggestions put to P.W.1 Shri Shetty and the plea taken by the said defendant/legal heir. The learned Civil Judge S.D. had rightly observed that no suggestion was put to P.W.1 Shri Shetty disputing the signature on the said

acknowledgment Exh.30 and had further observed that the said legal heir was not entitled to take contrary plea than the one taken by the original defendant. However, the learned Civil Judge S.D. wrongly observed that there was no evidence to show that the signature on the said acknowledgment (Exh.30) was that of the original defendant. As rightly pointed out on behalf of the plaintiff by learned Advocate Shri Joshi nothing prevented the learned Civil Judge S.D. to make use of section 73 of the Indian Evidence Act 1872 to compare the signature of the defendant as appearing on the said acknowledgment (Ex.30) along with other admitted documents on record and once such effort was made, there could be no doubt that the person who had signed the said acknowledgment (Ex.30) was the same person who had signed the other documents produced by the plaintiff regarding which there was no dispute. In the case at hand the plaintiff had produced the said acknowledgment dated 13.3.87 at Exh.30 and P.W.1 had stated that it was the acknowledgment signed by the said defendant. In case the said acknowledgment dated 13.3.87 - Exh.30 was not signed by the defendant or for that matter was signed along with the other documents when the credit facility was given was a matter which the defendant was required

to prove. In other words, the onus to prove the same was upon the defendant which the defendant had failed to discharge.

6. In the circumstances the findings given by the learned Civil Judge S.D. on issue No.2 deserve to be unsettled. Consequently the appeal deserves to succeed. The suit is hereby decreed against the defendants for the recovery of Rs.1,10,680.60 with pending and future interest at the rate of 18% from the date of the suit until payment.

N.A. BRITTO, J.

sl.